

**ASSEMBLY BILL**

**No. 1119**

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**Introduced by Assembly Member Emmerson**

February 27, 2009

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An act to amend Section 7108.5 of the Business and Professions Code, to amend Sections 3260, 3260.1, and 3262.5 of, and to add Section 3260.05 to, the Civil Code, and to amend Sections 7107, 10261.5, 10262, and 10262.5 of the Public Contract Code, relating to works of improvement.

LEGISLATIVE COUNSEL'S DIGEST

AB 1119, as introduced, Emmerson. Works of improvement: payments.

Existing law requires an owner of a private work of improvement to release retention proceeds withheld from any payment within 45 days after the date of completion. Existing law requires a public entity to release retention proceeds withheld from any payment by the public entity within 60 days after the date of completion. Existing law requires an original contractor to pay any subcontractor within 10 days from the time that all or any portion of retention proceeds are received by the original contractor. Existing law requires an original contractor or subcontractor to pay any subcontractor within 10 days from the time of receipt of each progress payment, unless otherwise agreed to in writing. Existing law imposes a penalty of 2% on the amount due per month on funds that are improperly withheld in a contract dispute relating to public and private works of improvement, as specified. The Contractors' State License Law provides for the licensing and regulation of contractors by the Contractors' State License Board.

Existing law requires any person or corporation that has contracted to do business with a public utility to pay any subcontractor within 15 working days of receipt of each progress payment from the public utility, except as specified. Existing law also requires a state agency that fails to make any progress payment within 30 days after receipt of the payment request to pay interest at the rate of 10% per year.

This bill would revise, recast, and consolidate the above provisions governing the timely payment of progress payments, retention proceeds, and final payments under a contract for a public or private work of improvement with respect to contracts entered into on or after January 1, 2010, and would subject a licensed contractor under the Contractors' State License Law to disciplinary action by the Contractors' State License Board for a violation of these provisions. The bill would require all owners, including a public utility or a state agency, to release retention proceeds withheld from any payment within a 45-day period, and, upon receipt of all or any portion of the retention proceeds or final payment, or any progress payment, would require an original contractor or subcontractor to pay his or her subcontractors within a 7-day period. The bill would also make the 2% penalty described above applicable to all owners of private and public works of improvement. The bill would additionally provide that the prevailing party in any action for the collection of funds wrongfully withheld is entitled to attorney's fees and costs.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 7108.5 of the Business and Professions  
2     Code is amended to read:  
3     7108.5. ~~A~~(a) *With respect to a contract entered into prior to*  
4     *January 1, 2010, a* prime contractor or subcontractor shall pay to  
5     any subcontractor, not later than 10 days of receipt of each progress  
6     payment, unless otherwise agreed to in writing, the respective  
7     amounts allowed the contractor on account of the work performed  
8     by the subcontractors, to the extent of each subcontractor's interest  
9     therein. In the event that there is a good faith dispute over all or  
10    any portion of the amount due on a progress payment from the  
11    prime contractor or subcontractor to a subcontractor, then the prime

1 contractor or subcontractor may withhold no more than 150 percent  
2 of the disputed amount.

3 *(b) A contract entered into on or after January 1, 2010, shall*  
4 *be governed by Section 3260.05 of the Civil Code and by*  
5 *subdivisions (c) to (e), inclusive.*

6 ~~Any~~

7 *(c) Any violation of this section or subdivision (d), (e), or (f) of*  
8 *Section 3260.05 of the Civil Code by a licensee shall constitute a*  
9 *cause for disciplinary action and shall subject the licensee to a*  
10 ~~penalty, payable to the subcontractor, of 2 percent of the amount~~  
11 ~~due per month for every month that payment is not made. In any~~  
12 ~~action for the collection of funds wrongfully withheld, the~~  
13 ~~prevailing party shall be entitled to his or her attorney's fees and~~  
14 ~~costs the penalty specified in subdivision (g) of Section 3260.05~~  
15 ~~of the Civil Code.~~

16 ~~The~~

17 *(d) The sanctions authorized under this section shall be separate*  
18 *from, and in addition to, all other remedies either civil,*  
19 *administrative, or criminal.*

20 ~~This~~

21 *(e) This section applies to all private works of improvement and*  
22 *to all public works of improvement, except where Section 10262*  
23 *of the Public Contract Code applies.*

24 SEC. 2. Section 3260 of the Civil Code is amended to read:

25 3260. (a) This section is applicable with respect to all contracts  
26 entered into on or after July 1, 1991, *and prior to January 1, 2010,*  
27 relating to the construction of any private work of improvement.  
28 However, the amendments made to this section during the 1992  
29 portion of the 1991–92 Regular Session of the Legislature are  
30 applicable only with respect to contracts entered into on or after  
31 January 1, 1993, relating to the construction of any private work  
32 of improvement. Moreover, the amendments made to this section  
33 during the 1993 portion of the 1993–94 Regular Session of the  
34 Legislature are applicable only with respect to contracts entered  
35 into on or after January 1, 1994, relating to the construction of any  
36 private work of improvement.

37 (b) The retention proceeds withheld from any payment by the  
38 owner from the original contractor, or by the original contractor  
39 from any subcontractor, shall be subject to this section.

1 (c) Within 45 days after the date of completion, the retention  
2 withheld by the owner shall be released. “Date of completion,”  
3 for purposes of this section, means any of the following:

4 (1) The date of issuance of any certificate of occupancy covering  
5 the work by the public agency issuing the building permit.

6 (2) The date of completion indicated on a valid notice of  
7 completion recorded pursuant to Section 3093.

8 (3) The date of completion as defined in Section 3086.

9 However, release of retentions withheld for any portion of the  
10 work of improvement which ultimately will become the property  
11 of a public agency, may be conditioned upon the acceptance of  
12 the work by the public agency. In the event of a dispute between  
13 the owner and the original contractor, the owner may withhold  
14 from the final payment an amount not to exceed 150 percent of  
15 the disputed amount.

16 (d) Subject to subdivision (e), within 10 days from the time that  
17 all or any portion of the retention proceeds are received by the  
18 original contractor, the original contractor shall pay each of its  
19 subcontractors from whom retention has been withheld, each  
20 subcontractor’s share of the retention received. However, if a  
21 retention payment received by the original contractor is specifically  
22 designated for a particular subcontractor, payment of the retention  
23 shall be made to the designated subcontractor, if the payment is  
24 consistent with the terms of the subcontract.

25 (e) If a bona fide dispute exists between a subcontractor and the  
26 original contractor, the original contractor may withhold from that  
27 subcontractor with whom the dispute exists its portion of the  
28 retention proceeds. The amount withheld from the retention  
29 payment shall not exceed 150 percent of the estimated value of  
30 the disputed amount.

31 (f) Within 10 days of receipt of written notice by the owner  
32 from the original contractor or by the original contractor from the  
33 subcontractor, as the case may be, that any work in dispute has  
34 been completed in accordance with the terms of the contract, the  
35 owner or original contractor shall advise the notifying party of the  
36 acceptance or rejection of the disputed work. Within 10 days of  
37 acceptance of the disputed work, the owner or original contractor,  
38 as the case may be, shall release the retained portion of the retention  
39 proceeds.

1 (g) In the event that retention payments are not made within the  
2 time periods required by this section, the owner or original  
3 contractor withholding the unpaid amounts shall be subject to a  
4 charge of 2 percent per month on the improperly withheld amount,  
5 in lieu of any interest otherwise due. Additionally, in any action  
6 for the collection of funds wrongfully withheld, the prevailing  
7 party shall be entitled to his or her attorney's fees and costs.

8 (h) It shall be against public policy for any party to require any  
9 other party to waive any provision of this section.

10 (i) This section shall not be construed to apply to retentions  
11 withheld by a lender in accordance with the construction loan  
12 agreement.

13 (j) *Contracts entered into on or after January 1, 2010, shall be*  
14 *governed by Section 3260.05.*

15 SEC. 3. Section 3260.05 is added to the Civil Code, to read:

16 3260.05. (a) Notwithstanding any other provision of law, this  
17 section applies to all contracts entered into on or after January 1,  
18 2010, relating to the construction of any private or public work of  
19 improvement.

20 (b) This section applies to contractual obligations between all  
21 of the following:

- 22 (1) Owners and original contractors.  
23 (2) Original contractors and subcontractors.  
24 (3) Subcontractors and subcontractors.

25 (c) The owner shall pay to the contractor, within 30 days  
26 following receipt of a demand for payment, any progress payment  
27 due as to which there is no good faith dispute between the parties.  
28 In the event of a dispute between the owner and the contractor,  
29 the owner may withhold from the progress payment an amount  
30 not to exceed 150 percent of the disputed amount. If any amount  
31 is wrongfully withheld in violation of this subdivision, the  
32 contractor shall be entitled to the penalty specified in subdivision  
33 (g).

34 (d) Subject to subdivision (f), within seven days from the date  
35 that all or any portion of any progress payment is received by the  
36 original contractor or subcontractor, the original contractor or  
37 subcontractor shall pay to any subcontractor, unless otherwise  
38 agreed to in writing, the respective amounts allowed the  
39 subcontractor on account of the work performed by the  
40 subcontractor, to the extent of each subcontractor's interest therein.

(e) The retention proceeds or final payment withheld from any payment by the owner from the original contractor, or by the original contractor from any subcontractor, shall be subject to the following requirements:

(1) (A) Within 45 days after the date of completion, or 100 days after cessation of labor, the retention proceeds or final payment withheld by the owner shall be released. “Date of completion,” for purposes of this subdivision, means any of the following:

(i) The date of issuance of any certificate of occupancy covering the work by the public agency issuing the building permit.

(ii) The date of completion indicated on a valid notice of completion recorded pursuant to Section 3093.

(iii) The date of completion, as defined in Section 3086.

(B) Notwithstanding subparagraph (A), the release of retention proceeds or final payments withheld for any portion of the work of improvement that ultimately will become the property of a public agency, may be conditioned upon the acceptance of the work by the public agency.

(2) Subject to subdivision (f), within seven days from the date that all or any portion of the retention proceeds or final payment is received by the original contractor, the original contractor shall pay, to each of its subcontractors from which the retention proceeds or final payment has been withheld, each subcontractor’s share of the retention proceeds or final payment received. However, if the retention proceeds or final payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention proceeds or final payment shall be made to the designated subcontractor.

(f) (1) If a bona fide dispute exists between an owner and original contractor, between the original contractor and a subcontractor, or between two subcontractors, the owner, original contractor, or subcontractor, as applicable, may withhold from the party with whom the dispute exists an amount not to exceed 150 percent of the disputed amount. The amount withheld shall not exceed 150 percent of the estimated value of the disputed amount. If any amount is wrongfully withheld in violation of this subdivision, the aggrieved party shall be entitled to the penalty specified in subdivision (g).

1 (2) Within seven days of receipt by the owner, original  
2 contractor, or subcontractor, as applicable, of written notice from  
3 the party with whom the dispute exists pursuant to paragraph (1),  
4 that any work in dispute has been completed in accordance with  
5 the terms of the contract, the owner or original contractor shall  
6 advise the notifying party of the acceptance or rejection of the  
7 disputed work. Within seven days of acceptance of the disputed  
8 work, the owner or original contractor shall release the retained  
9 portion of the disputed payment.

10 (g) If any payment is not made within the time periods required  
11 by this section, the owner, original contractor, or subcontractor  
12 withholding the unpaid amount shall be subject to a charge of 2  
13 percent per month on the improperly withheld amount, in addition  
14 to any interest otherwise due. Additionally, in any action for the  
15 collection of funds wrongfully withheld, the prevailing party shall  
16 be entitled to attorney's fees and costs.

17 (h) As applied to licensees under the Contractors' State License  
18 Law (Chapter 9 (commencing with Section 7000) of Division 3  
19 of the Business and Professions Code), a violation of this section  
20 shall also constitute a cause for disciplinary action under that  
21 chapter, and the sanctions authorized under this section shall be  
22 enforced by the Contractors' State License Board.

23 (i) The remedies authorized pursuant to this section are separate  
24 from, and in addition to, any other remedy authorized by law, and  
25 shall also be enforceable by civil, administrative, or criminal  
26 proceedings.

27 (j) It shall be against public policy for any party to require any  
28 other party to waive any provision of this section.

29 SEC. 4. Section 3260.1 of the Civil Code is amended to read:

30 3260.1. (a) This section is applicable with respect to all  
31 contracts entered into on or after January 1, 1992, *and prior to*  
32 *January 1, 2010*, relating to the construction of any private work  
33 of improvement.

34 (b) Except as otherwise agreed in writing, the owner shall pay  
35 to the contractor, within 30 days following receipt of a demand  
36 for payment in accordance with the contract, any progress payment  
37 due thereunder as to which there is no good faith dispute between  
38 the parties. In the event of a dispute between the owner and the  
39 contractor, the owner may withhold from the progress payment  
40 an amount not to exceed 150 percent of the disputed amount. If

1 any amount is wrongfully withheld in violation of this subdivision,  
2 the contractor shall be entitled to the penalty specified in  
3 subdivision (g) of Section 3260.

4 (c) Nothing in this section shall be deemed to supersede any  
5 requirement of Section 3260 respecting the withholding of retention  
6 proceeds.

7 (d) *Contracts entered into on or after January 1, 2010, shall be*  
8 *governed by Section 3260.05.*

9 SEC. 5. Section 3262.5 of the Civil Code is amended to read:

10 3262.5. (a) ~~Any~~ *With respect to contracts entered into prior*  
11 *to January 1, 2010, any person or corporation* ~~which~~ *that* has  
12 contracted to do business with a public utility, hereafter referred  
13 to in this section as a contractor, shall pay any subcontractors  
14 within 15 working days of receipt of each progress payment from  
15 the public utility, unless otherwise agreed in writing by the parties,  
16 the respective amounts allowed the contractor on account of the  
17 work performed by the subcontractors, to the extent of each of the  
18 subcontractors' interest in that work. In the event that there is a  
19 good faith dispute over all or any portion of the amount due on a  
20 progress payment from a contractor to a subcontractor, then the  
21 contractor may withhold no more than 150 percent of the disputed  
22 amount.

23 (b) Any contractor who violates this section shall pay to the  
24 subcontractor a penalty of 2 percent of the disputed amount due  
25 per month for every month that payment is not made. In any action  
26 for the collection of funds wrongfully withheld, the prevailing  
27 party shall be entitled to his or her attorney's fees and costs.

28 (c) This section shall not be construed to limit or impair any  
29 contractual, administrative, or judicial remedies otherwise available  
30 to a contractor or a subcontractor in the event of a dispute involving  
31 late payment or nonpayment by a contractor, or deficient  
32 performance or nonperformance by a subcontractor.

33 (d) *Contracts entered into on or after January 1, 2010, shall be*  
34 *governed by Section 3260.05.*

35 SEC. 6. Section 7107 of the Public Contract Code is amended  
36 to read:

37 7107. (a) This section is applicable with respect to all contracts  
38 entered into on or after January 1, 1993, *and prior to January 1,*  
39 *2010,* relating to the construction of any public work of  
40 improvement.



1 (b) The retention proceeds withheld from any payment by the  
2 public entity from the original contractor, or by the original  
3 contractor from any subcontractor, shall be subject to this section.

4 (c) Within 60 days after the date of completion of the work of  
5 improvement, the retention withheld by the public entity shall be  
6 released. In the event of a dispute between the public entity and  
7 the original contractor, the public entity may withhold from the  
8 final payment an amount not to exceed 150 percent of the disputed  
9 amount. For purposes of this subdivision, “completion” means any  
10 of the following:

11 (1) The occupation, beneficial use, and enjoyment of a work of  
12 improvement, excluding any operation only for testing, startup, or  
13 commissioning, by the public agency, or its agent, accompanied  
14 by cessation of labor on the work of improvement.

15 (2) The acceptance by the public agency, or its agent, of the  
16 work of improvement.

17 (3) After the commencement of a work of improvement, a  
18 cessation of labor on the work of improvement for a continuous  
19 period of 100 days or more, due to factors beyond the control of  
20 the contractor.

21 (4) After the commencement of a work of improvement, a  
22 cessation of labor on the work of improvement for a continuous  
23 period of 30 days or more, if the public agency files for record a  
24 notice of cessation or a notice of completion.

25 (d) Subject to subdivision (e), within seven days from the time  
26 that all or any portion of the retention proceeds are received by  
27 the original contractor, the original contractor shall pay each of its  
28 subcontractors from whom retention has been withheld, each  
29 subcontractor’s share of the retention received. However, if a  
30 retention payment received by the original contractor is specifically  
31 designated for a particular subcontractor, payment of the retention  
32 shall be made to the designated subcontractor, if the payment is  
33 consistent with the terms of the subcontract.

34 (e) The original contractor may withhold from a subcontractor  
35 its portion of the retention proceeds if a bona fide dispute exists  
36 between the subcontractor and the original contractor. The amount  
37 withheld from the retention payment shall not exceed 150 percent  
38 of the estimated value of the disputed amount.

39 (f) In the event that retention payments are not made within the  
40 time periods required by this section, the public entity or original

1 contractor withholding the unpaid amounts shall be subject to a  
2 charge of 2 percent per month on the improperly withheld amount,  
3 in lieu of any interest otherwise due. Additionally, in any action  
4 for the collection of funds wrongfully withheld, the prevailing  
5 party shall be entitled to attorney's fees and costs.

6 (g) If a state agency retains an amount greater than 125 percent  
7 of the estimated value of the work yet to be completed pursuant  
8 to Section 10261, the state agency shall distribute undisputed  
9 retention proceeds in accordance with subdivision (c). However,  
10 notwithstanding subdivision (c), if a state agency retains an amount  
11 equal to or less than 125 percent of the estimated value of the work  
12 yet to be completed, the state agency shall have 90 days in which  
13 to release undisputed retentions.

14 (h) Any attempted waiver of the provisions of this section shall  
15 be void as against the public policy of this state.

16 (i) *Contracts entered into on or after January 1, 2010, shall be*  
17 *governed by Section 3260.05 of the Civil Code.*

18 SEC. 7. Section 10261.5 of the Public Contract Code is  
19 amended to read:

20 10261.5. (a) ~~Any~~ *With respect to contracts entered into prior*  
21 *to January 1, 2010, any state agency*~~which~~ *that fails to make any*  
22 *progress payment within 30 days after receipt of the payment*  
23 *request from a contractor on a construction contract for an*  
24 *undisputed payment request,*~~which~~ *that was properly submitted*  
25 *by the contractor to the agency, shall pay interest to the contractor*  
26 *equivalent to the legal rate set forth in subdivision (a) of Section*  
27 *685.010 of the Code of Civil Procedure. Any state agency*~~which~~  
28 *that independently calculates the amount due on a progress*  
29 *payment and*~~which~~ *that fails to make a progress payment within*  
30 *30 days of the first submittal of the estimate for each contract by*  
31 *the engineer, shall pay interest to the contractor equivalent to the*  
32 *legal rate set forth in subdivision (a) of Section 685.010 of the*  
33 *Code of Civil Procedure. In the event that the payment is not made*  
34 *within 30 days of receipt of the contractor's request or the first*  
35 *submittal by the engineer, and the Controller has processed the*  
36 *payment within 14 days of receipt of the request or submittal, the*  
37 *contracting state agency shall pay interest to the contractor*  
38 *equivalent to the legal rate set forth in subdivision (a) of Section*  
39 *685.010 of the Code of Civil Procedure. In the event that the*  
40 *payment is not made within 30 days of receipt of the contractor's*

1 request or the first submittal by the engineer, and the contracting  
2 state agency has processed the payment within 16 days after receipt  
3 of the request or submittal, the Controller shall pay interest as  
4 provided in Section 685.010 of the Code of Civil Procedure.

5 For purposes of this section, a payment request shall be  
6 considered properly executed if funds are available for payment  
7 of the payment request, and payment is not delayed due to an audit  
8 inquiry by the Controller.

9 (b) Upon receipt of a payment request, each agency shall require:

10 (1) That each payment request be reviewed as soon as  
11 practicable after receipt for the purpose of determining that a  
12 payment request is a proper payment request.

13 (2) Any payment request determined not to be a proper payment  
14 request suitable for payment shall be returned as soon as  
15 practicable, but not later than seven days, after receipt, specifying  
16 the reasons that the payment request is not a proper payment  
17 request.

18 (3) The number of days available to a state agency to make a  
19 timely payment of payment request without incurring interest shall  
20 be reduced by the number of days by which an agency exceeds  
21 the requirements of paragraph (2).

22 (c) *Contracts entered into on or after January 1, 2010, shall be*  
23 *governed by Section 3260.05 of the Civil Code.*

24 SEC. 8. Section 10262 of the Public Contract Code is amended  
25 to read:

26 10262. ~~The~~ (a) *With respect to contracts entered into prior to*  
27 *January 1, 2010, the* contractor shall pay to his or her  
28 subcontractors, within 10 days of receipt of each progress payment,  
29 the respective amounts allowed the contractor on account of the  
30 work performed by his or her subcontractors, to the extent of each  
31 subcontractor's interest therein. The payments to subcontractors  
32 shall be based on estimates made pursuant to Section 10261. Any  
33 diversion by the contractor of payments received for prosecution  
34 of a contract, or failure to reasonably account for the application  
35 or use of the payments constitutes ground for actions ~~proscribed~~  
36 *prescribed* in Section 10253, in addition to disciplinary action by  
37 the Contractors' State License Board. The subcontractor shall  
38 notify, in writing, the Contractors' State License Board and the  
39 department of any payment less than the amount or percentage  
40 approved for the class or item of work as set forth in Section 10261.

1     **(b) Contracts entered into on or after January 1, 2010, shall be**  
2     **governed by Section 3260.05 of the Civil Code.**

3     SEC. 9. Section 10262.5 of the Public Contract Code is  
4     amended to read:

5     10262.5. (a) Notwithstanding any other provision of law, *with*  
6     *respect to contracts entered into prior to January 1, 2010*, a prime  
7     contractor or subcontractor shall pay to any subcontractor, not later  
8     than 10 days of receipt of each progress payment, the respective  
9     amounts allowed the contractor on account of the work performed  
10    by the subcontractors, to the extent of each subcontractor's interest  
11    therein. In the event that there is a good faith dispute over all or  
12    any portion of the amount due on a progress payment from the  
13    prime contractor or subcontractor to a subcontractor, then the prime  
14    contractor or subcontractor may withhold no more than 150 percent  
15    of the disputed amount.

16    Any contractor who violates this section shall pay to the  
17    subcontractor a penalty of 2 percent of the amount due per month  
18    for every month that payment is not made. In any action for the  
19    collection of funds wrongfully withheld, the prevailing party shall  
20    be entitled to his or her attorney's fees and costs.

21    (b) This section shall not be construed to limit or impair any  
22    contractual, administrative, or judicial remedies otherwise available  
23    to a contractor or a subcontractor in the event of a dispute involving  
24    late payment or nonpayment by a contractor or deficient  
25    subcontract performance or nonperformance by a subcontractor.

26    (c) On or before September 1 of each year, the head of each  
27    state agency shall submit to the Legislature a report on the number  
28    and dollar volume of written complaints received from  
29    subcontractors and prime contractors on contracts in excess of  
30    three hundred thousand dollars (\$300,000), relating to violations  
31    of this section.

32    **(d) Contracts entered into on or after January 1, 2010, shall be**  
33    **governed by Section 3260.05 of the Civil Code.**